IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston

WILLIAM EDWARD REBROOK III,

Petitioner,

v. Case No. 2:93-cr-00151

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT
OF ERROR CORAM NOBIS**

Petitioner William Edward ReBrook III, alleges the following in this **PETITION FOR A WRIT OF ERROR CORAM NOBIS** against Respondent United States of America and states as follows:

I.

JURISDICTION AND VENUE

This Court has jurisdiction and venue in this case, based upon the fact that this Court had jurisdiction and venue in the underlying criminal action, *United States of America v. William Edward ReBrook III*, Criminal No. 2:93-00151.

This **PETITION FOR A WRIT OF ERROR CORAM NOBIS** is filed pursuant to Title 28 U.S.C. §1651, the All Writs Act, which states as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

The writ of error coram nobis is available in extraordinary cases under compelling circumstances to achieve justice. *United States v. Morgan*, 346 U.S. 502, 512,74 S.Ct. 247, 253, 98 L.Ed. 248, 257 (1954); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988). In this case, Petitioner has completed serving the sentence he received as a result of his honest services wire fraud conviction, Petitioner continues to suffer negative consequences as a result of this felony conviction, and Petitioner has no other remedy available to him to challenge his conviction. Specifically, as a result of his honest services wire fraud conviction, Petitioner lost his law license for seven years, suffered a wide variety of personal and economic consequences, is prohibited from hunting with his son, nephews, and brother, cannot renew his auctioneer's license, which he had before the conviction, is barred from joining certain organizations, and is barred from holding certain public offices. Clearly, although Petitioner served his sentence and no longer is incarcerated, Petitioner continues to suffer from the consequences of this conviction.

Petitioner's purpose in seeking this Writ is to set aside his conviction for honest services wire fraud, Title 18 U.S.C.§§1343 and 1346, in light of the United States Supreme Court's recent rulings in *Skilling v. United States*, 561 U.S. ____, 2010 WL 2518587, 2010 U.S. LEXIS 5259 (2010), *Black v. United States*, 561 U.S. ____, 210 WL 2518593, 2010 U.S. LEXIS 5253 (2010), and numerous other decisions issued consistent with these decisions. Because the United States Supreme Court found the honest services wire fraud to be unconstitutionally vague, Petitioner's wire fraud conviction must be set aside.

Although there is no question that a petition for a writ of coram nobis is the only remedy available to Petitioner under these facts, there is no specific format for filing such a petition. For purposes of this **PETITION**, Petitioner is following, with some modifications, the format required for filing a habeas corpus petition from a state court conviction.

1. **(a) Name and location of court that entered the judgment of conviction you are challenging:** United States District Court for the Southern District of West Virginia.

   (b) Criminal docket or case number (if you know): 2:93-00151.

2. **(a) Date of the judgment of conviction (if you know):** On November 5, 1993, the jury convicted Petitioner of one count of securities fraud and one count of wire fraud, using the loss of honest services theory. The procedural history in this case is summarized in *United States v. ReBrook*, 837 F.Supp. 162 (S.D.W.Va. 1993), *United States v. ReBrook*, 842 F.Supp. 891 (S.D.W.Va. 1994), and *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995). The Fourth Circuit set aside Petitioner's securities fraud conviction, but affirmed the wire fraud conviction.

   (b) Date of sentencing: February 7, 1994.

3. **Length of sentence:** Petitioner was sentenced to serve 27 months on each count, with the sentences to be served concurrently, and two years of supervised release.

4. **In this case, were you convicted on more than one count or of more than one crime?** As noted above, Petitioner originally was convicted of one count of securities fraud and one count of wire fraud, but the Fourth Circuit set aside the securities fraud conviction.

5. **Identify all crimes of which you were convicted and sentenced in this case:** One count of securities fraud and one count of wire fraud.

6. **(a) What was your plea? (Check one)**

   (1) *Not Guilty* **X**.

   (2) *Guilty*

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? Not applicable.

(c) If you went to trial, what kind of trial did you have? Jury trial.

7. **Did you testify at a pretrial hearing, trial, or a post-trial hearing?** Petitioner testified at trial.

8. **Did you appeal from the judgment of conviction?** Yes.

If you did appeal, answer the following:

(a) Name of court: Fourth Circuit Court of Appeals.

(b) Docket or case number (if you know): No. 94-5124.

(c) Results: In *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995), the Fourth Circuit set aside the securities fraud conviction and affirmed the wire fraud conviction.

(d) Date of results: June 30, 1995.

(e) Citation to the case, if you know: *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995).

(f) Did you file a petition for writ of certiorari in the United States Supreme Court? Yes and, as noted above, the petition was denied.

10. **Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction?** No.

11. **If your answer to Question 10 was "Yes," give the following information:** Not applicable.

12. **For this petition, state the grounds upon which Petitioner asserts a writ of error coram nobis is required:**

On November 5, 1993, a jury convicted Petitioner in this Court of one count of insider trading *upon the misappropriation theory,* in violation 15 U.S.C. §§78ff and 78j(b), and 17 C.F.R. §240.10b-5, and one count of *honest services* wire fraud, in violation of 18 U.S.C. §§1343 and 1346.

The United States contended that Petitioner, who was the attorney for the West Virginia Lottery Commission, had "inside knowledge" that the Governor was planning to award an exclusive contract to a company known as Video Lottery Consultants, Inc. ("VLC") in exchange for VLC's promise to build its east coast factory in Gilmer County, West Virginia. The United States further contended that Petitioner then purchased 100 shares of VLC stock and tipped at least two other people to do the same.

Petitioner contended before, during and after the trial that he had no such knowledge, that he was not privy to the Governor's plan, and that everything he knew about VLC was in the newspapers. He further contended that VLC had never done business with the West Virginia Lottery Commission and that he had no fiduciary duty to VLC.

At the time Petitioner was counsel for the Lottery, the director of the West Virginia Lottery was Elton "Butch" Bryan. Mr. Bryan similarly was indicted for one count of securities fraud and one count of honest services wire fraud as well as one count of perjury. Although their cases are interrelated, Petitioner and Mr. Bryan were tried separately.

The only theory asserted by the United States against Petitioner on the wire fraud count was that Petitioner had denied the public of honest services. There was no evidence presented indicating that Petitioner ever received any kickback or bribe as a part of the evidence supporting this wire fraud count. Consistent with the United States' honest services wire fraud theory, the District Court instructed the jury:

> For the purpose of the wire fraud statute, the term "scheme or artifice to defraud" **includes also a scheme or artifice to deprive another of the intangible right of honest services**. While it may be properly charged under the wire fraud statute that a scheme violates or has as one of its goals the violation of some particular duty or duties imposed by state law as it is alleged here, it is not necessary that the scheme be one which violates a particular state statute or regulation or that it have as its goal something which is a crime in common law. Rather for the purpose of the wire fraud statute, any scheme involving deception that employs wire communication in its execution that is contrary to public policy and conflicts with accepted standard of moral uprightness, fundamental honesty, fair play and right dealing, may constitute a scheme or artifice to defraud. (Emphasis added).

As noted, the jury convicted Petitioner on both counts. In his separate trial, Mr. Bryan also was convicted on the securities fraud and wire fraud counts as well as for perjury.

Mr. Bryan's appeal was decided a few days before Petitioner's appeal was resolved. In *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995), the Fourth Circuit affirmed Mr. Bryan's honest services wire fraud and perjury convictions, but set aside the securities fraud conviction because the misappropriation theory had not been recognized at that time by the United States Supreme Court.

Similarly, in Petitoner's appeal, the Fourth Circuit reversed and dismissed the insider trading conviction, but allowed the honest services wire fraud conviction to stand. *United States v. ReBrook*, 58 F.3d 961 (4th Cir.), *cert. denied*, 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995). Thus, only the wire fraud conviction is at issue in this **PETITION**.

Prior to, during and after his trial, Petitioner argued that the "intangible right to honest services" provision of Title 18 U.S.C. §1346 was unconstitutionally void for vagueness. The District Court rejected those arguments in both *United States v. ReBrook*, 837 F.Supp. 162

(S.D.W.Va. 1993) and *United States v. ReBrook*, 842 F.Supp. 891 (S.D.W.Va. 1994), and the Fourth Circuit affirmed the conviction for *honest services* wire fraud in *United States v. ReBrook*, 58 F.3d 961 (4th Cir.) *cert. denied*, 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995). With his wire fraud conviction affirmed by the Fourth Circuit, Petitioner was forced to serve eighteen months of actual confinement at FCI-Morgantown, two months at a half-way house, and two years on supervised release.

In *Skilling*, 561 U.S. _____, 2010, WL 2518587, 2010 U.S. LEXIS 5259 and *Black*, 561 U.S. _____, 2010 WL 2518593, 2010 U.S. LEXIS 5253, the United States Supreme Court examined the constitutionality of honest services wire fraud and found 18 U.S.C. §1346 to be unconstitutionally vague. However, to salvage the statute, the majority determined that Title 18 U.S.C. §1346 "criminalizes only schemes to defraud that involve bribes or kickbacks."

Section III of the *Skilling* opinion addresses the validity of Mr. Skilling's honest services wire fraud conviction. In that section, the United States Supreme Court discusses at length the history of mail fraud and wire fraud, beginning with its original enactment in 1872. The Court traces the history of the *intangible right to honest services* doctrine beginning with the Fifth Circuit's *Shausan v. United States*, 117 F. 2d 110 (1941), up to the time of *McNally v. United States*, 483 U.S. 350 (1987):

> In 1987, this Court, in *McNally v United States*, stopped the development of the intangible rights doctrine in its tracks....
>
> We held that the scheme did not qualify as mail fraud. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." *Id.*, at 360. "If Congress desires to go further," we stated, "it must speak more clearly.'" *Ibid.* (Slip op. at 37).

As the *Skilling* Court went on to note, '"Congress responded swiftly. The following year, it enacted a new statute 'specifically to cover one of the *intangible rights* that lower courts had protected... prior to McNally: 'the intangible right of honest services." (Slip op. at 38). Later, the Court observed that, "In view of this history, there is no doubt that Congress intended §1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. (Footnote omitted) To preserve the statute without transgressing constitutional limitations, **we now hold that §1346 criminalizes only the bribe-and-kickback core of the pre-McNally case law."** (footnote omitted, emphasis supplied). (Slip op. at 44-45).

In footnote 38 of *Skilling*, the United States Supreme Court cited the Fourth Circuit's *Bryan* decision, among many others, as an example of a decision where federal courts demonstrated their reluctance to find the honest services wire fraud theory to be unconstitutionally vague.

In the present case, there were no allegations that Petitioner received bribes or kickbacks. The indictment alleged that he had deprived his employer, the State of West Virginia, of its "intangible right to honest services." The jury was instructed only on this honest services theory. At no point did the United States assert or present any evidence that Petitioner actually received bribes or kickbacks. Consequently, because the United States Supreme Court has held that the honest services wire fraud theory is unconstitutionally vague and the evidence of bribes or kickbacks are necessary to sustain a wire fraud conviction, justice requires that Petitioner's wire fraud conviction be set aside through this coram nobis procedure.

This result is identical to the coram nobis relief afforded by the Fourth Circuit to former Maryland Governor Marvin Mandel in *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988). Governor Mandel was convicted of mail fraud under a loss of honest services theory. After

Governor Mandel had finished serving his sentence, the United States Supreme Court issued its decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), holding that the mail fraud statute does not protect against schemes to defraud persons of their intangible rights such as the right to honest government. A year after *McNally* was decided, Congress amended the mail and wire fraud statutes to read "the term `scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." It was this provision the United States Supreme Court in *Skilling* found to be unconstitutionally vague.

Based upon the *McNally* decision, Governor Mandel filed a petition for a writ of coram nobis, seeking to have his mail fraud convictions set aside. In reviewing Governor Mandel's conviction, the Fourth Circuit initially noted, "In *Mandel*, there was one theory of the case before the jury which would alone permit conviction, that the State of Maryland and its citizens were defrauded of the honest and faithful services of Mandel, and this was sufficient to convict the petitioners of mail fraud." 862 F.2d at 1074. Based upon this conclusion, the Fourth Circuit rejected any attempts by the United States, after the trial was over, to assert other possible theories in support of the mail fraud convictions because the jury was presented only with the honest services theory. Ultimately, the Fourth Circuit concluded his mail fraud convictions could not be upheld under the *McNally* standard, which prompted the Fourth Circuit to grant coram nobis relief, setting aside the convictions, and ordering the repayment of any fines paid.

This same rationale applies in the present case. The only theory asserted against Petitioner was honest services wire fraud. Under *Mandel*, the United States cannot after the fact cobble together some new theory of wire fraud, which was not presented to the jury either in the evidence or the instructions. Clearly, under *Skilling*, Petitioner's conviction for one count of honest services wire fraud cannot be upheld because honest services wire fraud has been found to be unconstitutionally vague and there was no evidence of bribes or kickbacks involving Petitioner.

The *Skilling* decision has been used throughout the country to require honest services wire fraud convictions to be set aside, which were pending at the time *Skilling* was decided. Soon after *Skilling* was decided on June 24, 2010, the United States Supreme Court issued orders in the following cases requiring the lower courts to reevaluate the convictions in light of *Skilling*: *Scrushy v. United States*, 2010 U.S. LEXIS 5528; *Siegelman v. United States*, 2010 U.S. LEXIS 5529; *Hargrove v. United States*, 2010 U.S. LEXIS 5527; *Hereimi v. United States*, 2010 U.S. LEXIS 5535; *Richards v. United States*, 2010 U.S. LEXIS 5534; *Harris v. United States*, 2010 U.S. LEXIS 5531; *Redzic v. United States*, 2010 U.S. LEXIS 5536; *Weyhrauch v. United States*, 2010 U.S. LEXIS 5254.

Once the *Skilling* decision was issued, its holding has impacted honest services wire fraud convictions throughout the country. For example, Kevin L. Geddings, a former North Carolina Lottery Commissioner, was ordered released from federal prison on June 29, 2010, when Judge James C. Dever III of the United States District Court for the Eastern District of North Carolina concluded--and the United States Attorney conceded -- that Geddings' conviction for honest services wire fraud should be vacated in light of *Skilling*.

As Judge Dever noted in his Order, "Geddings was not convicted under a bribe or kickback theory at trial. Rather, Geddings was convicted under the undisclosed-self-dealing theory that the Supreme Court expressly rejected in *Skilling*. See *Skilling* at 2010 WL 2518587, at *28."

At the time this **PETITION** was filed, counsel has not been able to find any opinion in any other jurisdiction where a similar coram nobis petition already has been resolved. However, counsel is confident similar petitions are being filed in virtually all jurisdictions because the honest services wire fraud theory was used to convict many people throughout the country.

Coram nobis relief is required under these circumstances because Petitioner stands convicted of honest services wire fraud when the United States Supreme Court has determined, as a matter of law, that for a conviction of honest services wire fraud to be sustained, there has to be evidence that the defendant received bribes or kickbacks. Neither occurred in this case, thus, Petitioner continues to live under the prejudicial impact of his felony conviction when, under the law, his conviction cannot be sustained. Petitioner respectfully submits that coram nobis relief is required under these facts to achieve justice.

13. **Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?** Other than the original appeal, Petitioner has not sought any other relief in federal court from his conviction.

14. **Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?** No.

15. **Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:**

(a) At preliminary hearing: Not applicable.

(b) At arraignment: Arthur T. Ciccarello.

(c) At trial: Arthur T. Ciccarello.

(d) At sentencing: Arthur T. Ciccarello.

(e) On appeal: *Fourth Circuit:* Arthur T. Ciccarello.

United States Supreme Court: Richard F. Neely.

(f) In any post-conviction proceeding: Not applicable, other than the present **PETITION**.

(g) On appeal from any ruling against you in a post-conviction proceeding: Not applicable.

17. **Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?** No .

RELIEF SOUGHT

Therefore, Petitioner William Edward ReBrook III, respectfully asks the Court to grant the following relief: to review this **PETITION** and find that it is not subject to summary dismissal, to order Respondent to file an answer, motion, or other response within a fixed period of time, to have the entire record in the underlying criminal action, , *United States of America v. William Edward ReBrook III*, Criminal No. 2:93-00151, made a part of the record in the present case, and to issue an order setting aside Petitioner's conviction for one count of wire fraud, based upon the United States Supreme Court's decision in *Skilling*, which found the loss of honest services theory of wire fraud to be unconstitutionally vague, and to order any fines paid by Petitioner to be returned to him. Additionally, Petitioner respectfully seeks all other relief to which Petitioner may be entitled under the law.

WILLIAM EDWARD REBROOK III, Petitioner,

–By Counsel–

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. I.D. No. 3406)
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VERIFICATION

State of West Virginia

County of Kanawha, to-wit:

I, Lonnie C. Simmons, as counsel for Petitioner William Edward ReBrook III, after having been duly sworn under oath, do hereby state, under penalty of perjury, that the facts asserted in the foregoing **PETITION FOR WRIT OF ERROR CORAM NOBIS** are true, and to the extent the facts are based upon information and belief, I believe them to be true.

____
Lonnie C. Simmons (W.Va. I.D. No. 3406)

Sworn to and signed before me on the 9th day of August, 2010.

____
Notary Public

My Commission expires May 13, 2012.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Leigh Anne Kirk
16 Pinewood Circle
St. Albans, WV 25177
My Commission Expires May 13, 2012

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FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston

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UNITED STATES OF AMERICA,

Respondent.

Certificate of Service

I, Lonnie C. Simmons, do hereby certify that on August 9, 2010, a copy of the foregoing **PETITION FOR A WRIT OF ERROR CORAM NOBIS** was electronically served on the United States Attorney's office, to the following:

R. Booth Goodwin, II
United States Attorney
Hunter Paul Smith, Jr.
Assistant United States Attorney
Larry R. Ellis
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Charleston, West Virginia 25326
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/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. I.D. No. 3406)